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No. 07-459

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

AARON FLINT,

Petitioner,

v.

GEORGE DENNISON, in his official capacity as President of the University of Montana-Missoula, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the unanimous decision of the Court below correctly upheld, against constitutional challenge, a rule for student government elections at the University of Montana-Missoula that requires students to adhere to limits on their spending in campaigns for student government office.

2. Whether Petitioner's claims are moot.

LIST OF PARTIES

Aaron Flint, Petitioner.

George Dennison, in his official capacity as President of the University of Montana-Missoula; the Associated Students of the University of Montana, Kyle Engelson, in his official capacity as the ASUM Elections Committee Chair; Justin Baker, Averiel Wolff, Sophia Alvarez, Anna Green, Kris Monson, Derek Duncan, and Katie Boeckx, in their official capacities as ASUM Elections Committee Members; ASUM President Gale Price, ASUM Vice President Vinnie Pavlish and ASUM Business Manager Cassie Morton, in their official capacities as ASUM Executive Officers and ex-officio members of the ASUM Senate; Jessica Adam, Bryce Bennet, Andrew Bissell, Brad Cederberg, Tyler Clairmont, Nezha Haddouch, Shawna Hagen, Chris Healow, Andrea Helling, Derf Johnson, Britta Padgham, Kimberly Pappas, Josh Peters, Rebecca Pettit, Jake Pipinich, Ross Prosperi, Jon Snodgrass, Leslie Venetz, Nathan Ziegler, and Casey Hogue, in their official capacities as ASUM Senators, Respondents.

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BRIEF IN OPPOSITION

Respondents George Dennison, President of the University of Montana-Missoula; The Associated Students of the University of Montana; *et al.*, respectfully submit this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

The University of Montana-Missoula ("UM") offers qualified students the opportunity to run for and serve on a student government organization, the Associated Students of the University of Montana ("ASUM"). Among the many rules that apply to the competitive selection process for ASUM officers are limits on the amount of money students may spend on their campaigns for student government, and requirements for reporting and disclosing their expenditures. App. 70a. The spending limits serve to preserve the educational character of ASUM and to ensure that the opportunity to participate in student government is open equally to all students, regardless of their financial resources. App. 35a-36a.

Petitioner Aaron Flint ("Petitioner") commenced this action in 2004 when he was in his fourth and final year at UM. He sought declaratory and injunctive relief against the ASUM by-laws that impose spending limits on campaigns for student government office. Petitioner brought the action solely on his own behalf, not as a class action. He graduated in December

2004 and is no longer eligible to run for the ASUM Senate. App. 9a.

A. Statement of Facts

1. Facts Concerning ASUM

The ASUM Senate consists of three elected student executives (a president, vice-president, and business manager), twenty elected student senators, two non-voting faculty advisors, and other non-voting ex-officio positions as needed. ASUM Const. art. 4, § 1.[1] Since its 1906 inception, ASUM has been part of the UM educational mission.[2] The current ASUM Constitution provides that "ASUM is organized exclusively for educational and non-profit purposes[,]" with the primary responsibility of "serv[ing] as an advocate for the general welfare of the students." ASUM Const. art. 2, § 1. ASUM government and activities must comply with Montana state law and "the policies of the Montana State Board of Regents on Higher Education." *Id.* at § 4.

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[1] The full text of the ASUM Constitution may be found at http://www.umt.edu/asum/constitution.htm#2 (visited November 11, 2007).

[2] Declaration of Hayden Ausland in Regard to Plaintiff's Motion for Preliminary Injunction, May 27, 2004 ("Ausland Decl."), at ¶¶ 8-11 (R.29). Professor Ausland had served as ASUM faculty advisor (and a member of the ASUM Senate) for 13 years at the time he provided his Declaration. *Id.* at ¶ 2. In this Opposition, "R.___" refers to the docket number of the referenced filing in the district court.

ASUM is designed as a blend of republican and parliamentary governmental forms. Ausland Decl. at ¶¶ 6,10 (R.29). It offers students experience in many forms of leadership through which they develop various skills to handle student government responsibilities. *Id.* at ¶ 6. ASUM senators and executives have traditionally attended a special seminar or retreat each fall semester. *Id.* at ¶ 7; ASUM Bylaws art. II § 2.D.[3] These sessions may cover parliamentary procedure, service-learning or the promotion of leadership skills. Ausland Decl. at ¶ 7 (R.29).

Through ASUM participation, student senators and executives learn how to address conflicting interests of diverse constituencies; how to make recommendations about budget allocations; how to negotiate with administrators over matters such as tuition and fee increases; and how to draft policies for numerous student programs. The ASUM Senate thus gives students practical deliberative and legislative experience within the framework of the ASUM Bylaws and Constitution. This learning and experience form a significant part of these students' education. App. 3a; Ausland Decl. at ¶¶ 6-8 (R.29).

ASUM Senate membership is not open to the general public, nor to all members of the ASUM community (such as employees of ASUM), but instead

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[3] The full text of the ASUM Bylaws may be found at http://www.umt.edu/asum/government/bylaws.htm (visited November 11, 2007).

is open only to enrolled UM students who meet specific requirements. All ASUM officers must be registered for seven or more credits at UM during the fall and spring semesters (thereby paying the student activity fee) and must maintain at least a 2.0 cumulative grade-point average. App. 29a-30a; ASUM Const. art. 1 § 2, art. 7 § 1; ASUM Bylaws art. I § 3. In addition, students must run in and win election, following the rules established by the ASUM Constitution and Bylaws. App. 30a. A student who violates any election rules may be censured, denied ASUM campaign funding, barred from candidacy or prevented from taking office. ASUM Bylaws art. V §§ 5-6.

Because only a tiny fraction of the student body will have the opportunity to participate in student government during their four years at UM, it is particularly important that campaigns be governed by fair and uniform rules. The ASUM Constitution and Bylaws therefore significantly regulate student campaigns. For example, the Constitution requires that a student must file for candidacy by submitting petitions signed by 50 registered students. ASUM Const. art. 7 § 4(a). In addition, to assure that students need not ignore other academic pursuits in order to campaign for ASUM, the ASUM Bylaws limit the campaign period to three weeks. ASUM Bylaws art. V § 7. The Bylaws also prohibit the display of any campaign materials or the use of any place-holder signs prior to the start of the campaign period, ASUM

Bylaws art. V § 2.B,C;[4] prohibit door-to-door campaigning within residence halls or family housing, ASUM Bylaws art. V § 2.F; allow campaigning in classrooms only with instructor permission, *id.*; prohibit the placement of campaign posters except in very specific locations, ASUM Bylaws art. V § 2.G; and, at issue here, limit how much money a student may spend on his or her campaign, ASUM Bylaws art. V § 2.H.

Once elected, all ASUM officers must follow ASUM Personnel Policy requirements. ASUM Bylaws art. II § 2. An ASUM officer may be recalled from office for failure to perform the duties prescribed by the Bylaws. ASUM Const. art. 14 § 1; ASUM Bylaws art. II § 2, art. III § 2.

Because of ASUM's educational function, and the limited number of seats available, UM has a critical interest in making the ASUM election process fair and open to all qualified students, regardless of their

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[4] Contrary to the statement at p.5 of the Petition, this rule, and other rules governing the placement of posters and electioneering, apply to campaigning generally, not solely to candidates, ASUM Bylaws art. V § 2.B,C,F,G,H. App. 69a-70a. *See also* App. 30a. In addition, the grievance procedure regarding election law violations is not limited to violations by candidates. ASUM Bylaws art. V § 6A ("Any member who wishes to file a complaint concerning any action involved with campaigning or the election, *including, but not limited to*, rules violated by other candidates, voting discrepancies, and other procedures may submit a signed complaint to the Elections Committee. . . ." (emphasis added); *id.* § 6.D ("sanctions may include censure. . . .").

economic means. ASUM election spending limits, in place since 1970, App. 35a, help preserve the educational character of student government by ensuring that election to ASUM does not depend on the amount of personal or family resources available for a student to spend on an election campaign and that fundraising does not become a preoccupation for students.

This is particularly important at UM because of the acute financial needs of many UM students. Approximately two-thirds of the student body (and three-quarters of in-state students) use financial aid services and of those, a full 34 percent are eligible for federal Pell Grants awarded to the neediest students.[5] Indeed, a large percentage of UM Pell Grant recipients have family incomes so low that their federal application shows an Expected Family Contribution (EFC) of zero – the lowest possible amount. Hanson Decl. at ¶ 5 (R.29). If students were to begin winning election to the ASUM Senate by spending large sums on their campaigns, students without personal or family resources to spend on student elections would be discouraged from seeking the opportunity to participate. *Id.* at ¶ 10.

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[5] Declaration of Myron Hanson in Opposition to Plaintiff's Motion for Preliminary Injunction, May 25, 2004 ("Hanson Decl."), ¶¶ 4,6 (R.29). Mr. Hanson had been Director of the UM Financial Aid Office for 18 years at the time he provided his Declaration.

According to Goal B(2) of The Montana University System Strategic Plan, the University System seeks "to make sure that every academically qualified individual has an opportunity to receive the benefits of higher education without financial or social barriers."[6] Ensuring fair access to student government participation is thus important to the University's overall mission and goals. As Professor Ausland, ASUM's senior faculty advisor, explains: "To allow a wealthy student to monopolize access to election would be like allowing that same wealthy student to buy a first shot at enrolling in some sought-after history class, *i.e.*, it would be unworthy of an American institution of public higher education." Ausland Decl. ¶ 9 (R.29).

The ASUM election spending limits also serve UM's important educational interest in promoting diversity in its programs.[7] UM places great importance on attracting and retaining students from highly diverse backgrounds. *Id.* Diversity in student government, like diversity in the student body as a whole, enhances the education of all who participate by assuring their exposure to a wide variety of opinions and life experiences. *Id.* Absent spending limits,

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[6] Exhibit 2 to Declaration of Charles Couture in Opposition to Plaintiff's Motion for Preliminary Injunction, June 2, 2004 ("Couture Decl.) (R.29).

[7] Couture Decl., ¶¶ 4-11 (R.29). Dean Couture had served as Dean of Students at UM for ten years at the time he provided his Declaration.

students from diverse backgrounds would be less likely to run for ASUM office.[8] This would harm all students.

Consistent with UM's goal to provide educational opportunity to all students, ASUM provides financial resources for student campaigns. First, ASUM provides partial funding of student campaigns. Candidates are reimbursed for the first $10 of their campaign spending, plus 50 percent of their expenditures over that amount, up to the spending limit. ASUM Bylaws art. V § 2.G.4. ASUM cannot afford to provide matching funds for expenditures if there is no spending limit.[9] Spending limits therefore serve an important function in budgeting UM resources.

Additional resources that the University provides for campaigning include free publication of candidate profiles in the student newspaper, the *Montana*

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[8] As Dean Couture explained, "Perhaps because I am an enrolled member of the Salish Tribe that is located on the nearby Flathead Indian Reservation, American Indian students freely share their stories with me regarding their financial situations. A disproportionate number of American Indian students who attend the University are economically disadvantaged and could not afford to run for elected student leadership positions if the University was unable to impose campaign-spending limits. Also, many of the University's International students would face the same dilemma. . . ." *Id.* at ¶ 9 (R.29).

[9] Declaration of Gale Price in Opposition to Plaintiff's Motion for Preliminary Injunction, June 2, 2004 ("Price Decl."), ¶ 10 (R.29). Gale Price was President of ASUM at the time she provided her Declaration, and had run on a ticket with Petitioner previously in 2003. *Id.* at ¶ 1.

Kaimin. ASUM Bylaws art. V § 1.A.3. During the three-week campaign period, there are also debates sponsored by ASUM at the University Center: a forum for Senate candidates, a forum for executive candidates, and another Presidential-Vice Presidential debate following any primary. ASUM Bylaws art. V § 2.D.

2. Facts Concerning Petitioner's Alleged Injuries

In 2003, Petitioner sought election as president of ASUM on a ticket with Respondent Gale Price, who ran for vice-president. Flint and Price exceeded the applicable $175 spending limit during their campaign, and also falsified their disclosure statements by failing to report their actual expenditures for the campaign. App. 4a-5a; Price Decl. ¶ 3 (R.29). Petitioner's filings in this case do not disclose any reason why he believed it necessary to outspend other students seeking to serve on student government or to falsify his disclosure statements in 2003. Flint and Price won the election. App. 5a.

Flint's and Price's violations of the reporting requirements and spending limits were discovered. The ASUM Senate decided not to disqualify them from serving in office because of these first violations. Instead, the Senate voted to censure them for their non-reporting and for exceeding the spending limit. Price Decl. ¶ 3 (R.29). It is possible that the censure was reflected in minutes of the ASUM meeting where

the vote was taken, although the record of this case does not include such minutes. There is no allegation that the censure appears on Petitioner's academic transcript.

Petitioner has never alleged that ASUM's requirements for reporting and disclosing the amount of a student's ASUM campaign expenditures are unconstitutional. Accordingly, regardless of the outcome of his challenge to the spending limits, there would be no basis to expunge from any record the censure with respect to his violation of the reporting requirements.

In Petitioner's subsequent ASUM Senate bid in 2004, he again ignored the applicable $100 spending limit. App. 5a.[10] Because of this violation, the ASUM Senate voted to disqualify him from serving another term on the Senate. This disqualification vote is reflected only in the ASUM's minutes of the meeting

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[10] Neither Petitioner's complaint nor his later amended complaint alleged that his excess spending in 2004 was prompted by third-party expenditures opposing his candidacy, nor did he advance any such argument in his motions for a TRO and preliminary injunction. However, after those motions were denied, in his response to defendants' motion to dismiss the complaint, Petitioner for the first time submitted an affidavit making that assertion, most of which was not based on personal knowledge. App. 73a-75a. For example, his contention that posters were placed by College Democrats and the Montana Public Interest Group, and that there were "hundreds" of such posters, were made only "on information and belief." App. 73a-74a. In their reply, Defendants objected to the affidavit because it was not based upon personal knowledge (R.74). The lower courts never ruled on the admissibility of Petitioner's affidavit.

at which the vote was taken; there is no allegation that it appears in Petitioner's transcript. The relevant portion of the ASUM minutes states in full:

> Elections (Engelson) – Approximately 850 students had voted by midafternoon today (first of two days of elections). The Elections Committee made the following ruling on Flint's campaign violation – spending over the limit stipulated in the ASUM Bylaws: Negate all votes Flint receives in this General Election. This was moved by Engelson-Healow. Previous question calls by Cossit-Ziegler and Holmes-Helling failed. After a previous question call by Winkle-Ziegler, the motion passed 14Y, 5N, 1A on a roll call vote (see Tally Sheet). Volunteers are needed to watch the polling sites. Engelson thanked Winkle for sharing the use of the Kaimin ad space.[11]

Exhibit 11 to Plaintiffs' Amended Verified Civil Complaint for Declaratory and Injunctive Relief, June 17, 2004 (R.37).

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[11] Before the election, Petitioner also received a letter from the ASUM elections chair stating that he would be removed from the ballot because of the rules violation, but at Petitioner's urging the Senate instead waited until after the election to take a vote on his removal. App. 5a.

B. Proceedings Below

Petitioner commenced this lawsuit on May 5, 2004, by filing a complaint together with motions for a temporary restraining order and preliminary injunction. Petitioner submitted no evidentiary support for the preliminary injunction other than the verified statements of his complaint. The District Court denied the temporary restraining order. App. 6a.

With their legal memorandum in opposition to the motion for preliminary injunction, the Respondents submitted declarations with exhibits from several individuals: ASUM senior faculty advisor Hayden Ausland; UM Financial Aid Director Myron Hanson; UM Dean of Students Charles Couture; and Gale Price, the ASUM President elected in 2004 who was the ASUM Vice-President during Petitioner's presidency.[12] On July 7, 2004, the District Court held a hearing on the preliminary injunction motion (R.65), and denied the motion on August 20, 2004 (R.78).

Prior to resolution of the preliminary injunction motion, the Respondents filed a Rule 12(b) motion to dismiss the complaint (R.26). Petitioner subsequently filed an amended complaint and the Respondents then filed a motion to dismiss the amended verified complaint (R.66). With his opposition to the motion to dismiss, Petitioner filed an affidavit (R.72), to which

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[12] *See supra nn.* 2, 5, 6, 9.

the Respondents objected for lack of personal knowledge by Petitioner (R.74).

By Order dated October 8, 2004, the District Court converted the 12(b)(6) dismissal motion to a motion for summary judgment, providing the parties an opportunity to submit further evidentiary materials if desired (R.89). The Respondents submitted an additional declaration from Gale Price (R.90). Petitioner submitted no further evidence.

On March 28, 2005, the District Court issued an Order and opinion granting summary judgment to Respondents. App. 40a-52a. On April 25, 2005, Petitioner filed a Notice of Appeal (R.94).

The Court of Appeals, after finding that Petitioner's claims were not mooted by his graduation, App. 7a-11a, affirmed the district court's judgment. Judge Bea's opinion for a unanimous Court correctly recognized that reasonable, viewpoint-neutral rules governing participation in student activities are permissible under this Court's First Amendment precedents. App. 31a. The Court rejected Petitioner's argument that the First Amendment analysis applicable to funding of campaigns for Congress, the state legislature, and other public offices directly controls the constitutionality of a university's rules for participation in student government. App. 16a-19a. As the Court observed: "We should not apply the principles of *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)] without first considering whether the university setting affects our First Amendment analysis." App. 18a.

The Court of Appeals also rejected the Defendants' argument that the Court could uphold the student government spending limits without engaging in forum analysis because of the deference due to a school's determination of the policies necessary to carry out its educational mission. App. 19a-23a. Rather than give uncritical deference to the school's judgment, the Court held that it must "first scrutinz[e] more carefully the nature of the student election forum and the government's interest in limiting speech within that forum." App. 19a.[13] The Court applied forum analysis, viewing ASUM elections as a limited public forum and determining that the limits on students' campaign spending were permissible because they are both entirely viewpoint neutral and reasonable in light of the purpose of the forum. App. 31a-39a.

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly recognized that student government is not the equivalent of national or

[13] To be clear, Respondents have never argued that the university setting requires absolute deference to regulations that touch upon expressive activities. Respondents argued that forum analysis was not necessary given that the challenged regulations meet the requirement of viewpoint neutrality set forth in such cases as *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), which did not directly engage in forum analysis. Nevertheless, the result is the same whether or not forum analysis is applied: the regulations are permissible.

state government and that rules governing elections for student government are not subject to the same First Amendment analysis as laws governing campaigns for public offices such as Congress or the state legislature. Its ruling upholding the student government spending limits is fully faithful to this Court's precedents recognizing that viewpoint neutrality is the touchstone for the constitutionality of university rules that are intertwined with the university's educational mission, and with the Court's precedents applying First Amendment principles to expressive activity within a limited public forum. *See, e.g., Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). The only other Circuit to have reviewed a challenge to student government election rules also readily concluded that the First Amendment does not prohibit such rules. *Alabama Student Party v. Student Gov't Ass'n of the University of Alabama*, 867 F.2d 1344 (11th Cir. 1989). The rarity of federal court litigation over student government election rules and the lack of any conflict among the circuits that have considered the issue both confirm that the matter does not warrant this Court's intervention.

Moreover, even if the claim presented in this case were worthy of review, this case presents a poor vehicle for its consideration because it is unlikely Petitioner's claims would survive the threshold inquiry into mootness. Accordingly, the petition should be denied.

I. THE COURT OF APPEALS FAITHFULLY APPLIED THIS COURT'S PRECEDENTS, AND ITS DECISION IS NOT IN CONFLICT WITH THAT OF ANY OTHER CIRCUIT.

The Court of Appeals correctly held that the First Amendment permits universities to regulate students' participation in student government elections through viewpoint-neutral limits on students' campaign spending. Such limits are a reasonable means to preserve the purpose and educational character of student government participation. Indeed, to ignore the critical and significant distinctions between student government and student elections, on the one hand, and public office-holding and elections for public office, on the other, would misunderstand the purpose both of education and the First Amendment.

This Court has long recognized that "First Amendment rights must be analyzed 'in light of the special characteristics of the school environment.'" *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (*citing Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)). The Court of Appeals correctly determined that a standard requiring viewpoint neutrality, which the Court strictly applied to the challenged student government election rules, appropriately protects students' First Amendment rights while taking account of the educational goals that are intertwined with student government participation. Indeed, this Court's decision in *Southworth* confirms that, even when university policies carry a "high potential for intrusion" on students' First

Amendment rights, the policies will be upheld if they are strictly viewpoint-neutral. 529 U.S. at 232-234 (mandatory student activity fees used to support extracurricular student speech are permissible so long as they are administered in a viewpoint-neutral fashion, even though students are thus forced to subsidize speech they find objectionable or offensive). *See also Rosenberger*, 515 U.S. at 829-830 (university rules governing access to limited public forum must be viewpoint-neutral).

The ASUM spending limits, in force since 1970 and applicable to all candidates, are clearly viewpoint-neutral:

> There is no dispute in this case that the spending limit applies equally to all ASUM student candidates, as do all other campaign restrictions. The district court was presented no evidence showing that the University, through the spending limit, is attempting to suppress a particular point of view in the context of the ASUM election. Conversely, as evidenced by Gale Price's censure, the record demonstrates that the spending limit is applied equally to all student candidates, regardless of their views.

App. 32a.

The Court of Appeals, applying forum analysis, also correctly determined that the ASUM spending limits are reasonable in light of the purpose of the limited public forum that the University has created for ASUM elections. *Rosenberger*, 515 U.S. at 829

(restrictions must be "'reasonable in light of the purpose served by the forum,'" quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)). The limits applicable to spending on student government campaigns, like the unchallenged rules restricting campaigning to a three-week period prior to the election and requiring candidates to have a minimum 2.0 grade point average, help structure a fair election process within the educational mission of the university. This process provides an opportunity for all qualified ASUM members to compete for the limited number of seats available on the ASUM Senate, and thus to access the opportunities for leadership and policy learning that Senate participation provides.

In the absence of spending limits, students having greater financial resources could gain a significant advantage in student government campaigns by paying less well-off students to do campaign work for them, and would have no need to inspire assistance from volunteers who agree with their campaign agendas. Price Decl. at ¶ 8 (R.29).[14] At the same time, students without significant personal or family resources would be required to spend substantial time on fundraising – and less time on their other

[14] As Respondent Price noted, "if a candidate could hire 200 workers for an evening of postering, they could monopolize most of the available poster space on campus before anyone else has a chance to get their posters up. This would give a huge edge to students who have a lot of financial resources." *Id.*

studies – if they wished to run a competitive student government campaign against students whose personal resources are essentially unlimited.[15] As noted in one affidavit, such a result would be no more acceptable than requiring the university to auction off seats for popular, over-subscribed classes to students who can afford to pay extra tuition for the coveted seat in class. Ausland Decl. ¶ 9 (R.29); *see also id.* (election rules are intended "to prevent student government's being diverted by interests other than ones educational").

Consistent with UM's goal to provide opportunity for higher education regardless of family resources, ASUM Bylaws also provide for partial funding of student election campaigns. ASUM Bylaws art. V § 2.H.4. These funds come from the ASUM budget. If students must be permitted to spend unlimited amounts on their campaigns, ASUM will not be able to afford to provide matching funds for students lacking such financial resources. Price Decl. ¶ 10 (R.29).[16] All of these considerations underscore the

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[15] As noted in the Statement of Facts, many students at UM are able to attend the University only because of the financial aid the University provides. *See supra* at 6. Sponsoring a pizza party for campaign workers, as Petitioner did with part of his excess spending, Pet. at 8, is one way for a candidate to boost his popularity, but the budgets of many students do not permit such outlays for campaign workers.

[16] The limits thus help ensure that the University may determine "how best to allocate scarce resources." *See Widmar*, 454 U.S. at 276. Indeed, the ASUM Senate seats are themselves a scarce resource, given that only 23 seats are available each

(Continued on following page)

reasonableness of UM's decision to include viewpoint-neutral spending limits among the rules governing campaigns for student government.

Thus, contrary to Petitioner's contention, the ASUM regulations are fully permissible under this Court's First Amendment precedents. The conflicts that Petitioner alleges with this Court's precedents and those of other circuits are illusory.

1. The Court of Appeals' decision does not conflict with *Buckley v. Valeo*, 424 U.S. 1 (1976), or the other campaign finance precedents on which Petitioner relies.[17] *Buckley* and its progeny address campaign finance laws governing elections for public office, not student government elections. To argue that the First Amendment recognizes no difference between student government elections and elections for public office such as Congress and the state legislature simply blinks reality.

The ASUM Senate is "organized exclusively for educational and nonprofit purposes," ASUM Const.

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year. Although the court below expressly declined to rest its decision on the principle that a university enjoys broad discretion in deciding how to allocate its own resources, App. 20a-21a, that principle provides another basis for upholding the spending limits here.

[17] *Randall v. Sorrell*, 126 S.Ct. 2479 (2006); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

art. 2 § 1, and has an essential mission of helping to further the education of persons elected to serve there. *See* Statement of Facts, *supra* at 2-3. To state the obvious, the same is not true of Congress or a state legislature. Neither national nor state government is a creation of the Montana Board of Regents on Higher Education, as is ASUM, and neither, unlike ASUM, has a Constitution conditioned on the approval of the president of the University of Montana. ASUM Const. art. 13 § 4. Neither Congressional representatives nor state legislators are required to demonstrate a minimum grade point average to gain a place on the ballot, and such a requirement clearly would be unlawful for such offices. Yet even Petitioner concedes that such requirements are permissible for ASUM candidates. Pet. at 17. Unlike ASUM student candidates, candidates for Congress and the state legislature are not limited to a three-week campaign period to ensure that they and the student body can focus properly on their other academic pursuits. ASUM Bylaws art. V § 7. Again, such requirements would be impermissible as applied to candidates for public office, yet Petitioner never suggests they are unconstitutional.[18] The First Amendment does not

[18] Similarly, ASUM rules require that any contributions for student government campaigns must come only from students, App. 70a; ASUM Bylaws V § 2.H.5, a rule that could not be enforced at UM if precedents concerning campaigns for public office were directly controlling. *VanNatta v. Kiesling*, 151 F.3d 1215 (9th Cir. 1998) (striking down limits on donations from out-of-district residents). In addition, *Randall v. Sorrell* indicates that the First Amendment requires federal courts, at least in

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require the University to abandon all of these policies relating to ASUM elections merely because they would be unconstitutional as applied to elections for national and state government office. *Cf. Southworth*, 529 U.S. at 230 (university setting dictated modification of First Amendment analysis employed in Court's cases on forced subsidies for political expression: "the means of implementing First Amendment protections adopted in those decisions are neither applicable nor

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some circumstances, to parse the level of a specific contribution limit to assure that it does not systematically disadvantage challengers or favor incumbents. 126 S.Ct. at 2492-2500. To embroil the federal courts in this type of analysis of student government campaign limits would be absurd on its face. Yet that is the necessary consequence of accepting Petitioner's argument that this Court's precedents governing campaign finance laws in federal and state elections also control the constitutionality of rules concerning student government campaigns.

Indeed, if courts could not recognize a common-sense difference between student government elections and elections for public office, a host of unwelcome consequences would follow. Students must be enrolled at UM and pay a student activity fee in order to vote in ASUM elections; should this be treated as unlawful poll tax under the Twenty-fourth Amendment? Should the requirement of a 2.0 average for ASUM membership be invalidated as an unlawful literacy test? If a student falsifies a campaign disclosure statement in his election campaign, should this be treated not merely as a violation of student government rules but also a potential criminal violation under state disclosure requirements?

workable in the context of extracurricular student speech at a university").

Petitioner points to the role of the ASUM Senate in allocating student activity fees as indicating its equivalence with state and national government. However, the ASUM Constitution specifically provides that all such funds must be managed in accordance with Board of Regents policy, in addition to state and federal laws. ASUM Const. art. 8 § 5. Indeed, this is true of all ASUM activities. ASUM Const. art. 2 § 4 ("The ASUM government and activities must comply with Montana State law and the policies of the Montana Board of Regents on Higher Education").

Petitioner also attaches special significance to the fact that a spending limit could affect a student's efforts to campaign for ASUM office outside the university campus as well as on campus. Pet. at 24-25. As long as a student is seeking election to a student government position, however, the university surely can establish rules that apply to the student's overall campaign and not merely to on-campus activity – just as an athletic program may set conditioning requirements or curfews that affect a participant both on and off campus, or a university theater program may require student participants to forgo appearing in non-student productions (despite the obvious impact on expressive activity). In any event, the distinction is academic in this case because Petitioner presented no evidence that any of his excess spending was used for off-campus speech.

2. Petitioner also contends that the Court of Appeals' decision somehow conflicts with *Morse v. Frederick*, 127 S.Ct. 2618 (2007). Again, the conflict is wholly illusory. *Morse* upheld, against First Amendment challenge, a high school's decision to sanction a student who held up a sign that suggested support of drug use, even though the student was not on school property when he did so, and even though the student *concededly* was singled out for punishment because of the viewpoint expressed. The absence of a First Amendment violation in *Morse* in no way establishes the presence of a First Amendment violation here.

Petitioner points to Justice Alito's concurring opinion (joined by Justice Kennedy) in *Morse*, but nothing in the opinion suggests that the student government campaign rules at issue here are unconstitutional. The *Morse* concurring opinion made clear its disagreement with the argument that "the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission,'" 127 S.Ct. at 2637, because such a rule "would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Id.* The Court of Appeals' decision here is fully consistent with this view (and with the holding of *Tinker* closely scrutinizing school censorship of "expression of one particular opinion," 393 U.S. at 511). The decision specifically states that student government election rules would violate the First Amendment if they involved discrimination based on

the speaker's viewpoint. App. 31a ("any restriction on speech which is not viewpoint neutral or is unreasonable, fails constitutional scrutiny"). The decision thus in no way suggests that viewpoint discrimination may be justified by a school's articulation of an educational mission served by the discrimination. To the contrary, the Court of Appeals upheld the challenged spending limits only after examining the record to ensure that they were viewpoint-neutral. App. 31a-34a. It also carefully considered and distinguished *Rosenberger*, 515 U.S. at 828, on that basis, noting that *Rosenberger* would compel a different result if ASUM attempted to enforce campaign rules that were not viewpoint-neutral. App. 32a-33a. Nowhere in his Petition to this Court does Petitioner challenge the determination of both the district court and the Court of Appeals that the ASUM spending limits are viewpoint neutral.[19]

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[19] In his brief to the Court of Appeals, Petitioner argued that the failure to impose spending limits on non-candidate third parties constituted viewpoint discrimination. However, there is no evidence suggesting that the failure to limit independent spending is the result of a desire to discriminate against a particular viewpoint, or that third parties as a group seek to advance specific viewpoints different from the range of viewpoints advanced by candidates. Indeed, the only record evidence on the issue establishes at most one instance of third-party spending related to a student campaign, and thus it is unremarkable that the spending restrictions have not been extended to noncandidates. *See* Statement of Facts, *supra*, at n. 10. In any event, distinctions based on status or speaker identity are not considered viewpoint discrimination. *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 49-51 (1983);

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For these reasons, there is no merit to the suggestion that the decision below conflicts with *Morse*, nor that vacatur and remand are needed to allow the Court of Appeals to consider the impact of *Morse*.

3. Petitioner also errs in arguing that the decision below conflicts with *Widmar v. Vincent*, 454 U.S 263 (1981), by declining to treat student government elections as a designated public forum to which strict scrutiny applies. *See* Petition at 26-28. *Widmar* (which does not even use the term "designated public forum") struck down a university policy of excluding student religious groups from meeting on campus, where the university routinely allowed various non-religious groups to meet on campus. This Court emphasized that its holding was based on the university's selective exclusion of disfavored groups from a forum it otherwise made generally available to the public, 454 U.S. at 269, a factual scenario not present here. *Widmar* also cautioned that its decision should not be read to undermine the traditional deference afforded to a university's academic judgments concerning the best means to foster its educational mission. 454 U.S. at 276-277. *See also id.* at 277 ("A university has the "right to exclude even First Amendment activities that violate reasonable campus

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see also App. 37a-38a. Moreover, even in the context of elections for public office, a "statute is not invalid under the Constitution because it might have gone farther than it did." *Buckley*, 424 U.S. at 105 (citations and internal quotations omitted).

rules or substantially interfere with the opportunity of other students to obtain an education.").

Here, ASUM's spending limits for student government campaigns are applicable to all students seeking election to the ASUM Senate, and are designed to help structure a competition that allows fair access to the educational opportunities afforded by student government participation. For the reasons amply explained by the Court of Appeals, App. 26a-31a, student government elections cannot be analogized to traditional public forums such as parks and streets, or to a designated forum that the university has somehow "opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45. Student government elections are open only to students and, as a school-sponsored activity, are delimited by rules designed to preserve their educational character. App. 28a-31a.

Moreover, Petitioner simply ignores this Court's later decisions in *Rosenberger* and *Southworth*, which clarify that viewpoint neutrality is the touchstone for the constitutionality of regulations burdening expressive activity within the university setting. *Rosenberger*, 515 U.S. at 829-830; *Southworth*, 529 U.S. at 230, 233-234. Indeed, *Southworth* specifically notes that its viewpoint neutrality standard is consistent

with the standards of cases such as *Widmar. Id.* at 230.[20]

4. Finally, the decision below is not in conflict with that of any other circuit. Petitioner claims a conflict "in principle" with *Alabama Student Party v. Student Gov't Ass'n of the University of Alabama*, 867 F.2d 1344 (11th Cir. 1989). No conflict exists. *Alabama Student Party* rejected a First Amendment challenge to student government election rules that barred campaigning and debates for student government elections outside a specified period. 867 F.2d at 1345. The Court found that "[t]here was no evidence that the regulations were anything but viewpoint-neutral," *id.* at 1347, and that the regulations were a reasonable means of structuring competition for student government seats in light of the educational function served by student government service. *Id.* at 1345-46. The court below in this case reached the same conclusion. The mere fact that the *Alabama Student Party* decision did not specifically embrace forum analysis is immaterial, given its use of the

[20] The Respondents argued below that, even if First Amendment strict scrutiny were applicable to the university's regulations for student government elections, the spending limits satisfy strict scrutiny because they are narrowly tailored to serve the university's compelling interest in assuring access to student government participation by a diverse cross-section of students. The Court of Appeals found it unnecessary to reach this issue.

same viewpoint-neutrality and reasonableness standards employed by the court below.[21]

Similarly unavailing is Petitioner's attempt to discern a conflict with decisions from other circuits that have applied First Amendment forum analysis in contexts far removed from that of student government election campaigns. Pet. at 29-33. None of the cited cases holds that student government spending limits violate the First Amendment. An alleged discrepancy between isolated passages in opinions that apply the First Amendment in widely differing factual and doctrinal contexts does not amount to a circuit conflict that justifies this Court's intervention.

II. PETITIONER'S CLAIMS CANNOT SURVIVE A THRESHOLD REVIEW FOR MOOTNESS.

Even if the claims here otherwise warranted a grant of certiorari, this case would not be an appropriate vehicle for considering them because Petitioner's claims are unlikely to survive the necessary threshold

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[21] Indeed, the Eleventh Circuit used the terminology of forum analysis when it noted that the University "views its student government association, including the election campaigns, as a "learning laboratory," similar to the student newspaper or student yearbook," and that "student government and the campaigns associated with it do not constitute a forum generally open to the public, or a segment of the public, for communicative purposes, but rather constitute a forum reserved for its intended purpose, a supervised learning experience for students interested in politics and government." *Id.* at 1347.

inquiry into mootness. Petitioner graduated nearly three years ago and there is no prospect that he will again seek student government office at UM. *Cf. DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) (where plaintiff would graduate before challenge to admission policy could be heard, case was moot). Petitioner cannot take advantage of the mootness exception for cases that are "capable of repetition yet evading review," because of the lack of any possibility that he will again be subjected to the complained-of constitutional violation, *see Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990), and because he did not bring his lawsuit as a class action. *Cf. U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398-408 (1980) (mootness of named plaintiff's claim not fatal where plaintiff had filed motion to certify class action before his claim became moot).

The sole remaining basis on which Petitioner seeks to avoid a finding of mootness is his alleged continuing injury from the sanctions imposed in response to his violation of the spending limit: his censure by the ASUM Senate in 2003 and his disqualification from serving on the Senate in 2004. He alleges that the mere presence of these violations on his "record" establish a continuing injury sufficient to maintain his standing to adjudicate his constitutional claims.

Petitioner, however, submitted no evidence whatsoever to support his bare allegation that the ASUM sanctions would have continuing collateral consequences now that he has graduated from UM.

There is no allegation that the sanctions imposed by the ASUM Senate appear on his official transcript; at most, the evidence indicates that they appear in the minutes of the ASUM meetings where the votes were taken (although only the minutes from the 2004 disqualification vote are actually in the record). Petitioner submitted no evidence that any prospective employer or graduate school admissions office is likely to go beyond an examination of his official transcript to comb the minutes of ASUM meetings for student government election violations. He has not suggested any other way in which the election sanctions could conceivably affect him in the future.

The Court below, without extended discussion, simply presumed that the presence of the sanctions in ASUM records was sufficient to show continuing injury. App. 7a-11a. It cited no precedent of this Court authorizing such a presumption. It relied instead on *Hatter v. L.A. City High Sch. Dist.*, 452 F.2d 673 (9th Cir. 1971), which held that two students, one of whom had been suspended from high school and the other of whom had been reprimanded and threatened with suspension, could pursue their claims for expungement of school records even though they had graduated. It also distinguished *Students for a Conservative America v. Greenwood*, 378 F.3d 1129 *as amended in* 391 F.3d 978 (9th Cir. 2004), which had found moot a student's request for expungement of sanctions from his records because the university maintained no records of the sanction. The Court concluded that the existence of any University record was sufficient to

allow a presumption of Petitioner's continuing injury for Article III purposes. App. 10a-11a.

In the context of challenges to *criminal* convictions, this Court has created a presumption that a conviction will have continuing collateral consequences sufficient to avoid mootness of a challenge to the validity of the conviction, even after a sentence has been served. *See Sibron v. New York*, 392 U.S. 40, 55-58 (1968). The presumption suffices to preserve a criminal case from mootness unless it is shown "that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Id.* at 57. However, even in the criminal context, the Court has declined to extend that presumption to other violations such as parole revocation. Thus, in *Lane v. Williams*, 455 U.S. 624, 632-33 (1982), the Court declined to presume that continuing collateral consequences of parole revocation, such as a possible negative effect on employment prospects, were sufficient to prevent mootness once the additional period of incarceration had already been served. *See also Spencer v. Kemna*, 523 U.S. 1, 8-14 (1998) (following *Lane*).

Lane suggested that a parole revocation might carry little weight with an employer given that the underlying criminal conviction would remain on the ex-offender's record. *Id.* There is some analogy here, because Petitioner has never challenged the constitutionality of the reporting requirements that he violated along with the spending limits, and thus there would be no basis for expunging from ASUM minutes

the reference to his censure for that violation, even if the spending limit itself were found unconstitutional. *See* Statement of Facts, *supra*, at 10.

In sum, whether this Court would choose to extend the doctrine of *Sibron* to presume continuing effects from the disciplinary sanctions at issue here is, at best, unclear. These serious questions concerning the Court's ability to reach the merits thus provide an additional reason for denying the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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